

**KEE BOON SUAN & ORS v. ADVENTIST HOSPITAL
& CLINICAL SERVICES (M) & ORS AND OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA

VERNON ONG LAM KIAT JCA

YEOH WEE SIAM JCA

RHODZARIAH BUJANG JCA

[CIVIL APPEALS NO: P-02(NCVC)(W)-1384-08-2015,
P-02(NCVC)(W)-1385-08-2015, P-02(NCVC)(W)-1401-08-2015
& P-02(NCVC)(IM)-290-02-2016]
23 MAY 2018

TORT: *Negligence – Medical negligence – Breach of – Operation for spinal deformity – Patient became quadriplegic – Whether doctor obtained informed consent – Surgery without spinal cord monitoring facilities – Whether doctor breached duty of care in performance of surgery – Whether patient put in prone position for administration of anaesthesia caused quadriplegia – ‘But for’ test*

TORT: *Negligence – Damages – Medical negligence – Breach of – Operation for spinal deformity – Patient became quadriplegic – Award of general damages, general damages for future care, and special damages and pre-trial losses for the items of travel expenses, and future care and expenses by High Court – Whether there were appealable errors – Whether reasonable – Whether ‘life expectancy’ of ventilator dependent patient to be varied*

TORT: *Negligence – Vicarious liability – Whether hospital liable for negligence of doctors – Whether doctors independent contractors – Whether doctors operated independent businesses free from control and interference by hospital management – Failure by hospital to supply facilities to assist in surgery – Whether doctors’ failure to request supply of facilities negated hospital’s liability – Whether hospital liable under doctrine of non-delegable duty of care*

Originally, the plaintiff, Adventist Hospital & Clinical Services (M) (‘hospital’), commenced two suits (‘original action’) against the first and second defendants (‘patient’s parents’) in respect of the care, management and treatment of the patient at the hospital. In response to the hospital’s suits, the patient’s parents and the patient filed defence and counterclaimed for damages for medical negligence against the hospital and three doctors, namely, Dr Cheok, Dr Patrick and Dr Wong. The brief fact was that, the patient’s parents brought the patient to the hospital for consultation for the patient’s spinal deformity with Dr Cheok whom they knew through a newspaper article. Upon examination on the patient, Dr Cheok informed the patient’s parents that the patient would require a surgery, which was subsequently scheduled on 3 June 2008. The patient was admitted to the hospital on 2 June 2008. Dr Cheok obtained the approval of the hospital for

- A Dr Wong from the Kuching General Hospital to assist him in the performance of the surgery. Dr Patrick was the anaesthetist for the surgery. The consent form was signed by the patient's father. After the surgery, while still in the intensive care unit ('ICU'), Dr Cheok instructed the patient to move her legs, which she was able to do. The patient was subsequently
- B transferred to the general ward. Later, while in the general ward, the patient had collapsed and required an active resuscitation to regain her heartbeat and respiration. She was then transferred back to the ICU for further observation and was put on a ventilator. On 5 June 2008, Dr Cheok, after consultation with other doctors, removed the implants from the patient to exclude any
- C possible cause for the neurological deficit. However, there was no neurological improvement after the removal of the implants. The patient became quadriplegic wherein she was paralysed from the neck down and dependent on a ventilator for breathing. As the patient's parents were in financial difficulties to bear the costs for the surgery, the hospital agreed to contribute RM55,000 under Dr Earl Gardner Fund towards the costs of
- D surgery and 30% coverage of the medical bills under the Sabbath Fund for a period of one year. The hospital did not impose any charges against the defendants until after the expiry of the period given in the letter informing the patient's parents that the patient was medically fit to be discharged from the hospital. Except for the deposit of RM20,000, the medical bills were not
- E paid by the defendants. Hence, the hospital claimed a total amount of RM1,900,013.85 for the period from 31 July 2011 to 31 March 2015. The Judicial Commissioner ('JC'), *inter alia*: (i) allowed the hospital's claim in the original action and ordered the defendants to pay the hospital the amount of RM2,350,013.85; and (ii) allowed the patient's and the patient's parents'
- F claim against the hospital and the three doctors in the counterclaim. Hence, the four appeals herein: (i) Appeal No 1384 by the patient and her parents against the decision on the counterclaim; (ii) Appeal No 1385 by the three doctors in respect of part of the High Court decision which allowed the counterclaim of the patient for negligence against the three doctors;
- G (iii) Appeal No 1401 by the hospital against part of the decision of the High Court allowing the counterclaim of the patient and her parents and award of general damages together with interests and costs against the hospital; and (iv) Appeal No 290 wherein the hospital appealed against the dismissal of a notice of application to amend and/or vary the sealed order of the High Court to reflect the judgment of the High Court on the counterclaim in favour
- H of all the respondents in this appeal *ie*, the patient and her parents.

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Held (dismissing Appeal No 1384; dismissing Appeal No 1385 and varying order of High Court; allowing Appeal No 1401; and dismissing Appeal No 290)

Per Yeoh Wee Siam JCA delivering the judgment of the court:

- (1) In Appeal No 1384, the hospital had established its claim in the two consolidated civil suits for the medical bills of RM2,350,013.85. The claim was not disputed by the patient and her parents. Therefore, the appeal was dismissed with costs to the hospital and the decision and order of the High Court was affirmed. (paras 37 & 47) A
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- (2) The contract entered into by the hospital with Dr Cheok and Dr Patrick was one for services. Both doctors were independent contractors, as had been pleaded by them, and not agents or employees of the hospital. They operated independent businesses free from the control, interference and/or obstruction by the hospital management. Therefore, the learned JC had erred in holding that the hospital was vicariously liable for the alleged negligence of the two doctors. As for Dr Wong, he was brought in by Dr Cheok to perform the operation on the patient at the hospital with the approval given by the hospital and was not an employee of the hospital. Thus, the hospital was not vicariously liable for the alleged negligence of Dr Wong. There was also no evidence that Dr Cheok and Dr Wong had requested the hospital to supply spinal cord monitoring ('SCM') facilities for the patient's spinal surgery. Hence, the hospital could not be made liable on that issue. (paras 55-55) C
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- (3) A claim made under the doctrine of non-delegable duty of care must be expressly pleaded against the hospital. From a plain reading of the counterclaim of the patient and her parents, it was clear that their claim against the hospital was based on vicarious liability and not on the cause of action of non-delegable duty of care. Therefore, the issue ought not to have been considered by the JC when it was raised at the late stage of the submissions. The patient's parents had sought the services of Dr Cheok after reading about Dr Cheok in the newspaper. The hospital did not, through its own internal system, select Dr Cheok and Dr Wong to perform the surgery on the patient. In the absence of an antecedent relationship with the patient, the hospital could not be held liable under the non-delegable duty of care. (paras 59-61) F
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- (4) Dr Cheok had breached his duty of care for failing to obtain an informed consent from the patient's father at the pre-operation stage, when he advised the patient's parents to go ahead with the surgery on the patient. The patient could have been observed over a period of time since the patient's deformity was not even a cosmetic one and the I

- A patient was able to participate in school activities. However, Dr Wong and Dr Patrick should not be made liable for negligence at the pre-operation stage. Dr Wong was not present and was not involved at the pre-operation stage when the consent of the patient's father was obtained and the consent form was signed by the patient's father,
- B whilst Dr Patrick had obtained an informed consent before administering anaesthesia to the patient for the surgery. (paras 65, 66 & 68)
- (5) The cause of quadriplegia was not due to cord distraction at the time of the correction of the deformity, but due to ischaemia of the cord due to a vascular event. Therefore, the spinal cord monitoring during the operation was very important. The doctors should not be doing scoliosis surgery without the SCM facilities. Even though the wake-up test was used and after the surgery, while at the ICU, the patient could move her leg, the fact remained that the end result was that the patient was quadriplegic. Dr Cheok and Dr Wong had breached their duty of care to the patient in performing the spinal surgery without the SCM facilities. The hospital could not be made liable for failure to provide the SCM facilities when, in the first place, Dr Cheok and Dr Wong did not request the hospital to make the facilities available for their use during the surgery. (paras 72, 76, 79 & 80)
- E (6) It would be wrong to conclude that because of the patient being put in the prone position for administration of anaesthesia, the patient was quadriplegic. Applying the 'but for' test, but for the spinal cord surgery being performed on the patient by Dr Cheok and Dr Wong without the use of the SCM facilities, the mere act of putting the patient in the prone position and administering the hypotensive anaesthesia would not by itself cause the quadriplegia. Hence, Dr Patrick could not be held liable for negligence during the operation stage. (para 74)
- F (7) There was no specific pleading by the patient and her parents on the three doctors' negligence after the surgery in regard to the premature transfer of the patient from the ICU to the general ward. The patient and her parents were bound by their pleadings and they had only pleaded in respect of system failure *ie* the doctors' failure to have a proper, effective, safe and reliable system for the treatment of the patient and to prevent causing injury to the patient. This pleading was insufficient to cover the doctors' negligence at the post-operation stage. As such, Dr Cheok, Dr Patrick and Dr Wong could not be held liable for negligence after the surgery *ie*, for the alleged premature discharge and transfer of the patient from the ICU to the general ward.
- G It followed that there was no causal link or causation proved by the patient and her parents against the hospital. (paras 82 & 83)
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- (8) There were no appealable errors regarding the award made by the JC on general damages, general damages for future care, and special damages and pre-trial losses for the items of travel expenses, and future care and expenses. The item on 'life expectancy' was varied from the multiplier of 21.4 years based on a life expectancy of 48.6 years to a multiplier of 13 years based on a life expectancy of 37.3 years for the patient who was ventilator dependent. The award of RM10,000 for home nursing care should not be disturbed. The sum was reasonable since the patient, being ventilator dependent, would require not just one maid to take care of her basic needs, but required proper nursing care and management. (paras 84, 86 & 93)
- (9) The JC's award for costs of care, costs of future medical treatment/ consultations and costs of personal and hygiene needs were upheld except that the multiplier of 21.4 years, wherever applicable was substituted with multiplier of 13 years. The award for general damages for pain and suffering and loss of amenities of life was varied according to the new multiplier of 13 years. There should not be appellate intervention in the JC's exercise of discretion not to allow the patient an award on damages for goods and services tax, GST which would be incurred in the future. (paras 94 & 96)
- (10) With regard to Appeal No 290, the hospital filed the original action for outstanding medical bills against only the patient's parents. The patient was only brought in as a party and was involved when the defendants filed their defence and made a counterclaim against the hospital and the three doctors for negligence. Thus, it should be understood that the JC had intended that the patient was the only person entitled to be awarded the general damages and not the patient's parents. Hence, the general damages were to be paid to only the patient, as the third plaintiff in the counterclaim, and not to the patient's parents. Further, the error as to the total judgment sum had to be corrected to reflect the sum of RM6,023,802 and to be further amended in light of the new multiplier of 13 years. (paras 101 & 102)

Bahasa Malaysia Headnotes

Asalnya, plaintiff, Adventist Hospital & Clinical Services (M) ('hospital'), memulakan dua guaman ('tindakan asal') terhadap defendan-defendan pertama dan kedua ('ibu bapa pesakit') berkaitan dengan jagaan, pengurusan dan rawatan pesakit tersebut di hospital. Sebagai balasan terhadap guaman hospital, ibu bapa pesakit dan pesakit memfailkan pembelaan dan menuntut balas bagi ganti rugi untuk kecuaian perubatan terhadap hospital dan tiga orang doktor, iaitu, Dr Cheok, Dr Patrick dan Dr Wong. Fakta ringkas adalah, ibu bapa pesakit membawa pesakit ke hospital untuk berunding mengenai kecacatan tulang belakang pesakit dengan Dr Cheok yang mereka kenali melalui artikel surat khabar. Selepas pemeriksaan atas pesakit,

- A Dr Cheok memaklumkan ibu bapa pesakit bahawa pesakit memerlukan pembedahan, yang kemudiannya ditetapkan pada 3 Jun 2008. Pesakit dimasukkan ke hospital pada 2 Jun 2008. Dr Cheok memperoleh kebenaran hospital supaya Dr Wong, dari Hospital Besar Kuching, membantunya dalam pembedahan tersebut. Dr Patrick adalah pakar anestesia bagi pembedahan itu. Borang persetujuan ditandatangani oleh bapa pesakit.
- B Selepas pembedahan, semasa masih dalam unit jagaan rapi ('ICU'), Dr Cheok mengarahkan pesakit menggerakkan kakinya, yang boleh dilakukan oleh pesakit. Pesakit kemudiannya dipindahkan ke wad am. Selepas itu, semasa di wad am, pesakit pengsan dan memerlukan resusitasi aktif untuk memulihkan degupan jantung dan respirasinya. Dia kemudian dipindahkan semula ke ICU bagi untuk pemerhatian lanjut dan diletakkan dalam ventilator. Pada 5 Jun 2008, Dr Cheok, setelah berunding dengan doktor-doktor lain, mengeluarkan implan daripada pesakit untuk mengelak apa-apa kemungkinan kehilangan saraf. Walau bagaimanapun, tiada perkembangan saraf selepas pengeluaran implan tersebut. Pesakit menjadi kuadriplegik di mana dia lumpuh dari leher hingga ke bawah dan bergantung pada ventilator untuk bernafas. Oleh sebab ibu bapa pesakit mengalami masalah kewangan untuk membayar kos pembedahan, hospital bersetuju untuk menyumbang RM55,000 bawah Dana Dr Earl Gardner bagi kos pembedahan dan 30% coverage bagi bil perubatan bawah Dana Sabbath bagi tempoh setahun.
- C hospital tidak mengenakan apa-apa caj terhadap defendan-defendan sehingga tamat tempoh yang diberikan dalam suratnya kepada defendan bahawa pesakit boleh keluar dari hospital. Selain daripada deposit sejumlah RM20,000, bil perubatan tidak dibayar oleh defendan-defendan. Oleh itu, hospital menuntut sejumlah RM1,900,013.85 bagi tempoh dari 31 Julai 2011 sehingga 31 Mac 2015. Pesuruhjaya Kehakiman ('PK'), antara lain:
- D (i) membenarkan tuntutan hospital dalam tindakan asal dan memerintahkan defendan-defendan membayar hospital sejumlah RM2,350,013.85; dan (ii) membenarkan tuntutan pesakit dan ibu bapanya terhadap hospital dan ketiga-tiga doktor dalam tuntutan balas. Oleh itu empat rayuan di sini:
- E (i) Rayuan No 1384 oleh pesakit dan ibu bapanya terhadap keputusan tuntutan balas; (ii) Rayuan No 1385 oleh ketiga-tiga doktor terhadap sebahagian keputusan Mahkamah Tinggi membenarkan tuntutan balas pesakit bagi kecuaian terhadap ketiga-tiga doktor tersebut; (iii) Rayuan No 1401 oleh hospital terhadap sebahagian keputusan Mahkamah Tinggi membenarkan tuntutan balas pesakit dan ibu bapanya dan award ganti rugi am bersama-sama dengan faedah dan kos terhadap hospital; dan (iv) Rayuan No 290 di mana hospital merayu terhadap penolakan notis pemohonan untuk meminda dan/atau mengubah perintah meterai Mahkamah Tinggi untuk menunjukkan penghakiman Mahkamah Tinggi dalam tuntutan balas berpihak kepada kesemua responden-responden dalam rayuan ini iaitu pesakit dan ibu bapanya.
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Diputuskan (menolak Rayuan No 1384; menolak Rayuan No 1385 dan mengubah perintah Mahkamah Tinggi; membenarkan Rayuan No 1401; dan menolak Rayuan No 290)

Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:

- (1) Dalam Rayuan No 1384, hospital telah membuktikan tuntutannya dalam kedua-dua guaman sivil yang digabungkan untuk bil perubatan sejumlah RM2,350,013.85. Tuntutan tersebut tidak dipertikaikan oleh pesakit dan ibu bapanya. Oleh itu, rayuan tersebut ditolak dengan kos kepada hospital dan keputusan dan perintah Mahkamah Tinggi disahkan. A
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- (2) Kontrak yang dimasuki oleh hospital dengan Dr Cheok dan Dr Patrick adalah untuk perkhidmatan. Kedua-dua doktor adalah kontraktor persendirian, seperti yang diplid oleh mereka, dan bukan ejen atau pekerja hospital. Mereka menjalankan perniagaan persendirian yang bebas daripada kawalan, campur tangan dan/atau halangan pengurusan hospital. Oleh itu, PK khilaf apabila memutuskan hospital bertanggung secara vikarius terhadap dakwaan kecuaiian oleh dua daripada doktor-doktor tersebut. Bagi Dr Wong, dia disertakan oleh Dr Cheok untuk melakukan pembedahan ke atas pesakit di hospital tersebut dengan kebenaran hospital dan dia bukan pekerja hospital tersebut. Dengan itu, hospital tidak bertanggung secara vikarius bagi dakwaan kecuaiian Dr Wong. Juga, tiada keterangan bahawa Dr Cheok dan Dr Wong meminta hospital membekalkan kemudahan pengawasan saraf tunjang ('SCM') bagi pembedahan tulang belakang. Oleh itu, hospital tidak boleh dipertanggungkan atas isu tersebut. C
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- (3) Tuntutan yang dibuat bawah doktrin kewajipan berjaga-jaga tak boleh diwakilkan mesti diplidkan dengan jelas terhadap hospital. Daripada pembacaan zahir tuntutan balas pesakit dan ibu bapanya, jelas bahawa tuntutan mereka terhadap hospital adalah berdasarkan pada liabiliti vikarius dan bukan kausa tindakan kewajipan berjaga-jaga tak boleh wakil. Oleh itu, isu tersebut tidak perlu dipertimbangkan oleh PK apabila ia dibangkitkan di peringkat lewat penghujahan. Ibu bapa pesakit mendapatkan perkhidmatan Dr Cheok selepas membaca mengenai Dr Cheok dalam surat khabar. Hospital tidak memilih Dr Cheok dan Dr Wong melalui sistem dalamannya sendiri untuk melakukan pembedahan atas pesakit. Tanpa hubungan anteseden dengan pesakit, hospital tidak boleh dipertanggungkan bawah kewajipan berjaga-jaga tak boleh diwakilkan. F
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- (4) Dr Cheok telah melanggar kewajipan berjaga-jaga atas kegagalan memperoleh izin maklum daripada bapa pesakit di peringkat pra-pembedahan, apabila dia menasihati ibu bapa pesakit untuk meneruskan dengan pembedahan pesakit. Pesakit kemungkinan boleh diperhatikan bagi suatu tempoh oleh sebab kecacatan pesakit bukan I

- A suatu yang bersifat kosmetik dan pesakit boleh mengambil bahagian dalam aktiviti-aktiviti di sekolah. Walau bagaimanapun, Dr Wong dan Dr Patrick tidak boleh dipertanggungjawabkan bagi kecuaiannya di peringkat pra-pembedahan. Dr Wong tiada dan tidak terlibat dalam peringkat pra-pembedahan semasa izin bapa pesakit diperoleh dan
- B borang persetujuan ditandatangani oleh bapa pesakit, sementara Dr Patrick telah memperoleh izin maklum sebelum memberikan anestesia kepada pesakit bagi pembedahan tersebut.
- (5) Kuadriplegia tidak disebabkan oleh distraksi saraf semasa pembetulan kecacatan, tetapi disebabkan oleh iskemia saraf akibat vaskular. Oleh
- C itu pengawasan saraf tunjang semasa pembedahan adalah sangat penting. Doktor-doktor tersebut tidak sepatutnya melakukan pembedahan skoliosis tanpa kemudahan SCM. Walaupun ujian sedar digunakan dan selepas pembedahan, semasa masih di ICU, pesakit boleh menggerakkan kakinya, fakta kekal bahawa keputusan akhirnya adalah pesakit menjadi kuadriplegia. Dr Cheok dan Dr Wong telah melanggar kewajipan berjaga-jaga mereka terhadap pesakit dalam melakukan pembedahan tulang belakang tanpa kemudahan SCM. Hospital tidak boleh dipertanggungjawabkan bagi kegagalan membekalkan kemudahan SCM apabila, pada awalnya, Dr Cheok dan
- D Dr Wong tidak meminta hospital menyediakan kemudahan tersebut untuk kegunaan semasa pembedahan.
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- (6) Adalah salah untuk memutuskan bahawa pesakit mengalami kuadriplegia kerana pesakit diletakkan dalam kedudukan tertiarap untuk diberikan anestesia. Menggunakan ujian 'but for', jika bukan disebabkan oleh pembedahan tulang belakang yang dilakukan atas
- F pesakit oleh Dr Cheok dan Dr Wong tanpa kemudahan SCM, tindakan meletakkan pesakit dalam kedudukan tertiarap dan memberikan anestesia hipotensif sahaja tidak akan mengakibatkan kuadriplegia. Oleh itu, Dr Patrick tidak boleh dipertanggungjawabkan bagi kecuaiannya semasa pembedahan.
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- (7) Tiada pliding khusus oleh pesakit dan ibu bapanya bagi kecuaiannya ketiga-tiga doktor selepas pembedahan berkaitan dengan pemindahan pra-matang pesakit dari ICU ke wad am. Pesakit dan ibu bapanya terikat dengan pliding mereka dan mereka hanya memplid berkaitan dengan kegagalan sistem iaitu kegagalan doktor menyediakan sistem yang baik, efektif, selamat dan boleh dipercayai bagi rawatan pesakit dan mengelak menyebabkan kecederaan kepada pesakit. Pliding ini tidak mencukupi untuk merangkumi kecuaiannya doktor-doktor di peringkat selepas pembedahan. Oleh itu Dr Cheok, Dr Patrick dan
- H Dr Wong tidak boleh dipertanggungjawabkan bagi kecuaiannya selepas pembedahan iaitu bagi pelepasan dan pemindahan pesakit dari ICU ke wad am. Berikutan itu, tiada kaitan penyebabkan dibuktikan oleh pesakit dan ibu bapanya terhadap hospital.
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- (8) Tiada kekhilafan yang boleh dirayu berkaitan award telah dibuat oleh PK bagi ganti rugi am, ganti rugi am bagi jagaan masa hadapan, ganti rugi khas dan kerugian sebelum perbicaraan bagi item-item bagi perbelanjaan perjalanan, dan jagaan dan perbelanjaan masa hadapan. Item bagi 'jangka hayat' diubah daripada pendarab 21.4 tahun berdasarkan jangka hayat 48.6 tahun kepada pendarab 13 tahun berdasarkan jangka hayat 37.3 tahun bagi pesakit yang bergantung pada ventilator. Award RM10,000 bagi penjagaan di rumah tidak wajar diganggu. Jumlah tersebut adalah munasabah kerana pesakit, yang bergantung pada ventilator, akan memerlukan bukan sahaja seorang pembantu untuk menjaga keperluan asasny, tetapi memerlukan jagaan dan pengurusan yang baik. A B C
- (9) Award PK bagi kos jagaan, kos rawatan/rundingan perubatan masa hadapan dan kos keperluan peribadi dan kesihatan dikekalkan kecuali pendarab 21.4 tahun, di mana terpakai digantikan dengan pendarab 13 tahun. Award ganti rugi am bagi kesakitan dan penderitaan dan kehilangan keselesaan hidup diubah menurut pendarab baru 13 tahun. Tidak wajar ada campur tangan rayuan dalam pelaksanaan budi bicara PK yang tidak membenarkan pesakit award ganti rugi bagi cukai barangan dan perkhidmatan, GST, yang akan dikenakan pada masa hadapan. D E
- (10) Berkaitan Rayuan No 290, hospital memfailkan tindakan asal bagi bil perubatan tertunggak terhadap hanya ibu bapa pesakit. Pesakit hanya disertakan sebagai satu pihak dan dilibatkan apabila defendan-defendan memfailkan pembelaan dan membuat tuntutan balas terhadap hospital dan ketiga-tiga doktor untuk kecuai. Oleh itu, adalah jelas bahawa PK meniatkan pesakit sebagai satu-satunya orang yang berhak diawardkan ganti rugi am dan bukan ibu bapa pesakit. Oleh itu, ganti rugi am perlu dibayar kepada pesakit sahaja, sebagai plaintif ketiga dalam tuntutan balas, dan bukan ibu bapa pesakit. Selanjutnya, kekhilafan tentang jumlah keseluruhan penghakiman perlu dibetulkan untuk menggambarkan jumlah RM6,023,802 dan dibetulkan selanjutnya berikutan pendarab baru 13 tahun. F G

Case(s) referred to:

Cassidy v. Ministry of Health [1951] 2 KB 343 (*refd*)

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 8 CLJ 427 FC (*refd*) H

Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC (*refd*)

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC (*refd*)

Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC (*refd*) I

Various Claimants v. Catholic Child Welfare Society And Others [2013] 2 AC 1 (*refd*)

A *For the Adventist Hospital - Cecil Abraham, JJ Chan, Joyce Tam; M/s Chan Ban Eng & Co*
For the appellants - Rhina Bhar, KB Karthi, Evan Lee; M/s Rhina Bhar & Assocs
For the Dr Cheok Chee Yew & 2 Others - Nurulhuda Mansor; M/s Shearn Delamore & Co

B *[Editor's note: For the High Court judgment, please see Adventist Hospital & Clinic Services (M) v. Kee Boon Suan & Anor And Another Case [2015] 8 CLJ 676 (overruled in part).]*

Reported by S Barathi

C **JUDGMENT**

Yeoh Wee Siam JCA:

Introduction

D **[1]** The following four civil appeals (“the four appeals”) were heard before us:

- (a) Appeal No. P-02(NCVC)(W)-1384-08-2015 (“Appeal No. 1384”);
- (b) Appeal No. P-02(NCVC)(W)-1385-08-2015 (“Appeal No. 1385”);
- E** (c) Appeal No. P-02(NCVC)(W)-1401-08-2015 (“Appeal No. 1401”); and
- (d) Appeal No. P-02(IM)(NCVC)-290-02-2016 (“Appeal No. 290”).

[2] The four appeals arose from the Penang High Court (“High Court”) decision in respect of Civil Suit No. 22NCVC-85-02-2013 (“suit 85”) consolidated with Civil Suit No. 22NCVC-307-10-2013 (“suit 307”).

F **Background Facts**

The Parties

G **[3]** The plaintiff, Adventist Hospital & Clinic Services (M) (“hospital”), commenced suit 85 and suit 307 (“the two suits” or “original action”) for unpaid medical bills against the first and second defendants, namely Kee Boon Suan (“patient’s father”), and Ang Mooi Sim (“patient’s mother”) (“patient’s parents”) in respect of the care, management and treatment of their daughter, Kee Jun Hui (“patient”), at the hospital.

H **[4]** In response to the hospital’s above two suits, the patient’s parents and the patient filed the defence and made a counterclaim for damages for medical negligence (“negligence”) against the three doctors and the hospital.

[5] The three doctors are:

- I** (a) Dr Cheok Chee Yew (“Dr Cheok”) and Dr Wong Chung Chek (“Dr Wong”), consultant orthopaedic surgeons, who are the second and fourth defendants respectively in the counterclaim. Both Dr Cheok and Dr Wong carried out the operation on the patient at the hospital; and

(b) Dr Patrick Tan KS (“Dr Patrick”), the anaesthetist assigned by the hospital for the said operation. He is the third defendant in the counterclaim. A

[6] For ease of identification for the purposes of these four appeals, we would refer to the parties according to their abbreviated names. B

Salient Facts

The Hospital’s Original Action Against The Patient’s Parents On Outstanding Medical Bills

[7] On 2 June 2008, the patient was admitted to the hospital for spinal surgery which was scheduled on 3 June 2008. C

[8] The patient’s parents had financial difficulties to bear the costs for the surgery. Therefore the hospital, under the Dr Earl Gardner Fund, agreed to contribute RM55,000 towards the cost of the surgery which was about RM70,000. Subsequently, the hospital agreed to grant a 30% coverage of the medical bills under the Sabbath fund for a period of one year which was until 26 May 2009. D

[9] The hospital did not impose any charges against the defendants until after the expiry of the period given in its letter to the defendants dated 23 December 2010 informing that the patient was medically fit to be discharged from the hospital. E

[10] Except for the deposit of RM20,000, the medical bills for the period of 31 July 2011 to 31 January 2012 for the amount of RM218,606.10, the period of 31 January 2012 to 26 February 2013 for the amount of RM537,477, and the period of 29 February 2013 to 30 September 2014 in the sum of RM873,553.65 were not paid by the defendants. As the medical charges are continuing on a daily basis, the total amount claimed by the hospital for the period from 31 July 2011 to 31 March 2015 is RM1,900,013.85. F

The Defendants’ Counterclaim For Negligence G

[11] It is an undisputed fact that the patient’s parents had come to know of Dr Cheok through a newspaper article.

[12] On 2 May 2008, the patient’s father brought his 12 years old daughter, ie, the patient or the third plaintiff in the counterclaim, to the hospital for consultation with Dr Cheok for the patient’s spinal deformity. H

[13] Dr Cheok conducted physical examination on the patient and found the presence of a higher left shoulder with a stiff right thoracic hump and a plump line 2cm off centre. There was no neurological deficit. The X-ray of the patient revealed that the patient had a double thoracic curve with cobb’s I

- A angle: $T1 - T5 = 62^\circ$ and $T6 - T12 = 100^\circ$. Dr Cheok concluded that the patient had idiopathic scoliosis. Dr Cheok then informed the patient's father about the surgery that the patient would require.
- B [14] On 2 June 2008, the patient was admitted into the hospital. The operation was scheduled on 3 June 2008. Dr Cheok then obtained the approval from the hospital for Dr Wong, from the Kuching General Hospital, to assist him to perform the surgery on the patient.
- [15] On the same day, 2 June 2008, the patient's father signed a consent form for the said surgery.
- C [16] On 3 June 2008, the surgery was carried out by Dr Cheok and Dr Wong, with Dr Patrick as the anaesthetist. The surgery took about seven hours from 9am to 4pm.
- [17] The surgery was performed with the patient in a prone position and hypotensive anaesthesia was administered with a view to reduce intra-operative bleeding (see opinion of Dr KS Dhillon ("Dr Kuldip") in AR vol 2(9) Pt C pp. 2885 and 2886 in Appeal No. 1401).
- D [18] After the surgery, whilst the patient was still in the Intensive Care Unit (ICU), Dr Cheok instructed the patient to move her legs, which the patient was able to do.
- E [19] On 4 June 2008 at 11.15am Dr Cheok noted in the nursing report "T/O to Paed's ward" which indicates his instruction to transfer the patient out of the ICU to the Paediatric general ward ("general ward"). This was confirmed by Dr Cheok in his evidence. The patient was then transferred to the general ward.
- F [20] At the general ward, on the same day, when the patient was awake, the patient's parents spoke to her. The patient became drowsy and the patient's mother tried to wake her up but there was no response from her. The patient's father then called the nurse who came. The nurse told the patient's parents not to worry as it was only due to the pain relief medication given to the patient and the patient needed a lot of rest. The nurse then left the room.
- G [21] On the same day, at about 2.50pm the ward nurse informed Dr Cheok that the patient had collapsed in the general ward. When Dr Cheok arrived at the general ward, he was informed by the staff nurse that the ward nurses had carried out active resuscitation by way of cardiac massage, ambu-bagging and cardio-pulmonary resuscitation (CPR) and that the patient had regained her heartbeat and respiration.
- H [22] The patient was transferred back to the ICU for further observation and put on a ventilator.
- I

[23] On 5 June 2008, the neurological assessment of the patient showed no movement of the patient's upper and lower limbs. Dr Cheok discussed the matter with Dr Khaw Poh Guan, the consultant paediatrician, Dr Samuel Easaw, the consultant neurologist at the hospital, and two other spinal surgeons. It was the consensus of the doctors that the implants be removed from the patient to exclude any possible cause of the neurological deficit.

A

[24] Thereafter, the patient's father was informed by Dr Cheok of the decision and rationale to remove the implants and a written consent was obtained from the patient's father. On the same day, 5 June 2008, at 4pm. Dr Cheok removed all the implants from the patient.

B

[25] After the implants were removed, there was no neurological improvement of the patient's condition.

C

[26] The X-rays and MRIs done on the patient, after the removal of the implants, show as follows:

- (i) MRI of the brain on 11 June 2008 shows "diffuse acute infarction of the spinal cord/medulla with haemorrhagic transformation";
- (ii) MRI of the cervical spine on 11 June 2008 shows "extensive acute infarction of lower medulla and cervical spinal cord with haemorrhagic transformation in the central cord";
- (iii) MRI of the thoracic spine on 17 June 2008 shows "extensive cord oedema and infarction".

D

E

[27] The patient is quadriplegic. She is paralysed from the neck down and dependent on a ventilator for breathing.

F

Decision Of The High Court

[28] In his grounds of judgment ("judgment") dated 14 July 2015, the learned Judicial Commissioner ("JC"), Nordin bin Hassan, at pp. 61 and 62 (AR vol 1/2 Pt A pp. 80 and 81 in Appeal No. 1384) made the following Orders:

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[202] The Plaintiff's claim in the original action for the outstanding medical bills is allowed.

[203] The Defendants in the original action is to pay the Plaintiff in the amount of RM2,350,013.85.

[204] I also order the Defendants in the original action to pay cost to the Plaintiff in the sum of RM20,000.

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[205] The interest shall be at the rate of 5% per annum on the judgment sum until full realisation.

[206] In the counterclaim the Defendants who become the Plaintiffs, claim for damages for medical negligence. The Plaintiffs' claim is allowed.

I

- A [207] The Defendants in the counterclaim is to pay the Plaintiffs' general damages of RM6,023,802.
- [208] The interest for the general damages of RM6,023,802 shall be at the rate 8% per annum from date of filing the suit until date of judgment.
- B [209] There shall also be an interest at the rate of 5% per annum on the judgment sum until full realisation.
- [230] I also order the Defendants in this counterclaim to pay cost to the Plaintiff in the sum of RM60,000.

The Four Appeals

- C *Appeal No. 1384*

[29] This appeal is by the patient and her parents against the High Court's decision on the counterclaim as follows:

- D 1. that the claim for past and future hospital expenses incurred be disallowed;
2. that the applicable multiplier for calculating certain items of future loss and damage be 21.4 years;
3. that damages for the cost of nursing care be awarded in the sum of RM10,000.00 a month;
- E 4. that no award of damages be made for the Goods and Services Tax (GST) which would be incurred on various items of future loss and damage, and
5. that costs be awarded to be 3rd Appellant in the sum of RM60,000.00.

- F (Note: In sub-para. 5 above, the "third appellant" refers to the patient).

Appeal No. 1385

- G [30] This appeal is by the three doctors, namely Dr Cheok, Dr Patrick and Dr Wong in respect of part of the High Court decision which allowed the counterclaim of the patient for negligence against the three doctors and which ordered general damages of RM6,037,600, interests and costs of RM60,000 against them.

Appeal No. 1401

- H [31] This appeal is by the hospital against part of the decision of the High Court which allowed the counterclaim of the patient and her parents and awarded general damages together with interests and costs against the hospital.

- I

Cross-Appeal

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[32] In Appeal No. 1401, the patient and her parents filed a cross-appeal to vary the High Court order dated 14 July 2015 as follows:

1. bahawa tuntutan Responden Ke-3 untuk perbelanjaan hospital yang lepas dan masa depan dibenarkan;
2. bahawa pengganda ("multiplier") yang terpakai untuk mengira item-item masa depan yang tertentu bagi kerugian dan kerosakan masa depan dinaikkan kepada 56.6 tahun atau jangka hayat lain yang munasabah;
3. bahawa ganti rugi untuk kos penjagaan kejururawatan diawadkan dalam jumlah RM50,000.00 sebulan;
4. bahawa suatu awad ganti rugi dibuat bagi Cukai Barangan dan Perkhidmatan (GST) yang akan ditanggung untuk pelbagai item kerugian dan kerosakan masa depan; dan
5. bahawa kos diawadkan kepada Responden Ke-3 dalam jumlah yang melebihi RM60,000.00 dan juga perbelanjaan hangus dalam jumlah RM101,817.65 dibenarkan."

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D

(Note: "responden ke-3" or the third respondent in the above refers to the patient).

Appeal No. 290

E

[33] Subsequent to the High Court decision, the hospital filed a notice of application ("the application") to amend and/or vary the sealed order of the High Court dated 14 July 2015 ("sealed order") in para. 4 thereof which reads as follows:

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4. Tuntutan *Plaintiff Ke-3 dalam tuntutan balas* dalam kedua-dua guaman no. 85 dan 307 dalam jumlah RM6,037,600.00 dibenarkan dengan faedah ke atasnya pada kadar 8% setahun daripada tarikh pemfailan hingga tarikh penghakiman.

[34] The hospital submits that the sealed order which allowed the counterclaim of the third plaintiff (ie, the patient) is incorrect since it does not reflect the judgment of the High Court which had given judgment on the counterclaim in favour of all the respondents in this appeal (ie, the first, second and third plaintiffs in the counterclaim, namely the patient and her parents).

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[35] The learned JC, Abdul Wahab bin Mohamad, heard the application and dismissed it with costs on 15 January 2016. The hospital then filed Appeal No. 290 against the whole of the said decision of the High Court dated 15 January 2016.

I

A Our Decision

[36] Having heard the submissions of respective learned counsel, and having perused the records of appeal, on 27 April 2018 we delivered our unanimous decision and made the following orders:

B *Appeal No. 1384: Regarding The Main Claim Of The Hospital, And The Counterclaim Of The Patient And Her Parents, For The Refund Of The Deposit For Surgery*

C [37] The appeal of the patient and her parents regarding the main claim of the hospital for hospital bills, and the counterclaim of the patient and her parents for a refund of the deposit of RM20,000 paid to the hospital, is dismissed with costs to the hospital. The decision and order of the High Court is affirmed.

Appeal No. 1385: Regarding The Counterclaim

D [38] The appeal of Dr Cheok and Dr Wong regarding liability for negligence is dismissed with costs to the patient. The decision and order of the High Court regarding these two doctors is affirmed except that we now vary that order and apportion the liability of Dr Cheok to be 65% and the liability of Dr Wong to be 35%.

E [39] The appeal of these two doctors regarding quantum of damages is dismissed except for the multiplier of 21.4 years which appeal is now allowed and substituted with the multiplier of 13 years for the various items awarded, wherever applicable.

F [40] The appeal on liability for negligence of Dr Patrick is allowed with costs to him. The decision and order of the High Court on liability regarding Dr Patrick is set aside.

G [41] In the event that this decision on liability is later reversed by the Federal Court, then the appeal of Dr Patrick regarding quantum of damages is dismissed except for the multiplier of 21.4 years which is to be allowed and substituted with the multiplier of 13 years for the various items awarded, wherever applicable.

Appeal No. 1401 : Regarding The Counterclaim

H [42] The appeal of the hospital regarding liability for negligence is allowed with costs to the hospital. The decision and order of the High Court on liability is set aside.

I [43] In the event that this decision on liability of the hospital is later reversed by the Federal Court, then the appeal of the hospital regarding quantum of damages is dismissed. In such a case, the decision of this court regarding the quantum of damages allowed against Dr Cheok and Dr Wong shall also apply to the hospital.

Cross-Appeal

A

[44] The cross-appeal of the patient and her parents in Appeal No. 1401 regarding quantum of damages is dismissed with costs to the hospital.

Appeal No. 290

[45] The appeal of the hospital is dismissed with costs to the patient and her parents. The decision and order of the High Court is affirmed. However, the sum for general damages in the counterclaim in the same order is to be amended accordingly from RM6,037,600 to a sum which has taken into account the new multiplier of 13, instead of the old multiplier of 21.4, for the total damages awarded.

B

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[46] We would deal with the issue regarding costs, and other consequential orders in the later part of this judgment.

Grounds Of Decision

Appeal No. 1384: Regarding The Main Claim Of The Hospital, And The Counterclaim By The Patient And Her Parents For Refund Of The Deposit For Surgery

D

[47] We find no merits in the appeal. The learned JC had rightly held that the hospital had established its claim in the two consolidated civil suits ie, Civil Suit No. 22NCVC-85-02-2013 and Civil Suit No. 22NCVC-307-10-2013 for the medical bills of RM2,350,013.85 and allowed the same. The hospital's claim was not disputed by the patient and her parents. In fact, as stated by the learned JC in his judgment, learned counsel for the patient and her parents had agreed in his oral submissions, and as stated in para. 177 of his written submissions, that the claim is to be allowed. Accordingly, the appeal of the patient and her parents is dismissed with costs to the hospital. The decision and order of the High Court is affirmed.

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Appeals No. 1384, 1385 And 1401: Regarding The Counterclaim

Issue on liability

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Regarding the Hospital

Vicarious liability

[48] The learned JC held that the hospital was vicariously liable for breach of duty of care to the patient based on the following clauses of the agreement of the doctor with the hospital:

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- (i) clause 5.4 - the doctor is automatically become member of the Medical and Dental Staff of the Hospital and subject to the by-laws of the Medical and Dental Staff.
- (ii) clause 5.5 - the doctor only provides his services during office hours of working days of the Hospital.

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- A (iii) clause 5.6 - the doctor to devote all his time, attention and abilities to the business of the Hospital.
- (iv) clause 5.10 - the doctor to provide 24 hours coverage for all patients admitted to the Hospital under his care and service and the doctor must be one who his (*sic*) credential and approved by the hospital.
- B (v) clause 5.11 - the doctor must insure (*sic*) the patients medical record must be completed within 5 working days from the date of discharge of the patients and failing which the Hospital has the right to withhold payment of the medical fees.
- C [49] As for Dr Patrick, the learned JC stated that he was involved in the surgery on 4 June 2008 only upon the approval of the hospital, and the hospital's executive committee had agreed to give him a fee of RM5,000.
- [50] Having analysed all the facts, the learned JC concluded that the hospital had some control over the doctors in the performance of their duty in the hospital. In totality, he found that the doctors were in fact the agents of the hospital in providing the healthcare to the patient. Therefore, the learned JC held that the hospital was vicariously liable for the negligent acts of the doctors.
- D [51] In considering these appeals, we are guided by the recent Federal Court decision in *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529 ("*Sunway* case"). In that case, the Federal Court considered the two-stage test in *Various Claimants v. Catholic Child Welfare Society And Others* [2013] 2 AC 1 which the Supreme Court laid down for imposing vicarious liability for the tortious acts of abuse by the brothers in the religious institute:
- E
- F (1) Whether the relationship between D1 and D2 is sufficiently akin to that of employer and employee; and
- (2) Whether there is a sufficiently close connection between the D1-D2 relationship and D1 's tortious act.
- G [52] In the *Sunway* case (*supra*), in deciding the fourth question, namely:
- Whether private hospitals in Malaysia such as the Appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors *vis-à-vis* their patients while practising at such private hospitals as independent contractors?",
- H the Federal Court at p. 565 stated:
- The test for vicarious liability in *Various Claimants* requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of
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fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

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[53] From a perusal of contract entered into by the hospital with Dr Cheok and Dr Patrick respectively, it is clear that the contract was one for services, and both doctors are independent contractors, and not agents or employees of the hospital. As submitted by the hospital, both doctors operated independent businesses free from the control, interference, and/or obstruction by the hospital management. We note that in fact both Dr Cheok and Dr Patrick have specifically pleaded that they were independent contractors. Therefore, the learned JC had erred in holding that the hospital was vicariously liable for the alleged negligence of these two doctors.

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[54] As for Dr Wong, it is clear from the evidence adduced that Dr Wong was brought in by Dr Cheok to perform the operation on the patient at the hospital with the approval given by the hospital. However, Dr Wong was not an employee of the hospital. Thus, the hospital was also not vicariously liable for the alleged negligence of Dr Wong.

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[55] There is no evidence that Dr Cheok and Dr Wong had requested the hospital to supply spinal cord monitoring ("SCM") facilities for the patient's spinal surgery. Thus, the hospital cannot be made liable on that issue.

Issue on non-delegable duty of care

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[56] We observe that the learned JC adopted the doctrine of non-delegable duty as explained in *Cassidy v. Ministry of Health* [1951] 2 KB 343 where Lord Denning, *inter alia*, stated:

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, **he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract for services ...** the hospital authorities accepted the plaintiff as a patient for treatment, and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He has no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him. I decline to enter into question whether any of the surgeons were employed only under a contract for services, as distinct from contract of service. The evidence is meagre enough in all conscience in that point. But the liability of the hospital authorities should not and does not, depend

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- A on nice considerations of that sort. **The plaintiff knew nothing of the terms on which they employed their staff**, all he knew was, that he was treated in the hospital by people whom the hospital authorities appointed and **the hospital authorities must be answerable for the way in which he was treated.** (emphasis added)
- B [57] With respect, we find that without much analysis, the learned JC had applied the doctrine of non-delegable duty of care to the hospital and held in para. 147 of his judgment that the hospital was liable under the said doctrine:
- C This doctrine will certainly put (*sic*) hospital authority on alert to ensure excellent healthcare to patients and provide all the required safety protocols to be followed strictly by their staffs or their independent contractors and this certainly will help to avoid or minimise their negligent act. In a way this doctrine will help to improve the organizational (*sic*) and the system of a hospital.
- D [58] Regarding the said doctrine, here again we are guided by the decision in the *Sunway* case (*supra*) where at p. 558 the Federal Court stated:
- E Non-delegable duties are based on an assumption of responsibility, inferred from the circumstances of the relationship between the plaintiff and the defendant. It is not imposed based on relative resources or vested interest, nor does it depend on the terms of the relationship between the defendant and the person to whom the duty is delegated. The personal choice of a patient is not an independent test in itself but a relevant factor in applying the *Woodland* analysis, in particular in determining whether there is an antecedent patient-hospital relationship from which to impute as assumption of responsibility by the hospital towards the patient.
- F The facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding the Plaintiff's engagement of Dr Kok and admission to the Hospital, it can be inferred that the Plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the Hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by
- G Dr Kok, we do not find that the Hospital has assumed a positive duty to protect the Plaintiff from injury.
- H This scenario can be contrasted with a hypothetical situation where a patient enters a hospital and relies upon the latter's internal system to be referred to any suitable doctor on duty. In that situation, the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty to ensure that he is treated with due care, by whomever the hospital engages to do so.
- I [59] Applying the above principle to the present case, we agree with the submissions of the hospital that, on the facts, the hospital did not have an antecedent relationship with the patient. It is clear from the evidence

adduced that the patient's parents had sought the services of Dr Cheok after reading about Dr Cheok in the newspaper. The hospital did not, through its own internal system, select Dr Cheok and Dr Wong to perform the surgery on the patient. In the absence of an antecedent relationship with the patient, the hospital cannot be held liable under the non-delegable duty of care.

[60] More importantly, we note that the issue of non-delegable duty of care was not even pleaded by the patient and her parents in the first place. Therefore, the issue ought not to have been considered by the learned JC when it was raised at the late stage of the submissions. We do not agree with the submissions of learned counsel for the patient and her parents who, in relying on the Federal Court decision in *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427, submits that even if "the plaintiff had not pleaded direct liability on the hospital's part for negligence ... the essence of a non-delegable duty have been pleaded".

[61] With respect, we are of the opinion that a claim made under the doctrine of non-delegable duty of care must be expressly pleaded against the hospital. Otherwise, from a plain reading of the counterclaim of the patient and her parents, it is clear that their claim against the hospital is based on vicarious liability, but not on the cause of action of non-delegable duty of care.

Regarding the three doctors

Pre-operation stage

[62] At the time when the patient first saw Dr Cheok on 2 May 2008, Dr Cheok noted in his record, *inter alia*, that the patient's deformity was noted a year ago, and the patient was able to participate in school activities. However, Dr Cheok advised for surgery.

[63] According to Dr Kuldip, the patient's plumb line is only 2cm off centre, that means a very slight tilt. It is not even a cosmetic problem, so Dr Kuldip questioned the need for spinal surgery to correct the deformity. With the patient's double curve and range, he would not even recommend surgery.

[64] Dr Cheok in his evidence admitted that it is important to observe the patient over a period of time to see the progression of the scoliosis. Dr Cheok admitted that he did not inform the patient's father of the inherent and material risks of quadriplegia that may arise from the surgery to be undertaken by him and Dr Wong. This is also evident from the consent form dated 2 June 2008 produced in court which only stated a 1-2% risk of paraplegia (ACB vol 3 for Appeal No. 1385 p. 476 bottom). As such, the

- A learned JC had rightly held that there was a breach of duty of care and negligence on the part of Dr Cheok for failing to obtain an informed consent from the patient's father (see also Federal Court decision in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 359).
- B [65] We agree with the learned JC that based on Dr Cheok's initial examination, and Dr Kuldip's evidence, Dr Cheok had breached his duty of care to the patient at the pre-operation stage when he advised the patient's parents to go ahead with surgery on the patient. The patient could have been observed over a period of time since the patient's deformity was not even a cosmetic one, and the patient was able to participate in school activities.
- C [66] However, we are of the opinion that Dr Wong should not be made liable because he was not present and was not involved at the pre-operation stage when the consent of the patient's father was obtained and the consent form was signed by the patient's father.
- D [67] Further to the above, we are of the opinion that the learned JC is right to hold that Dr Cheok had breached his duty of care by not requesting for and referring to the medical records or clinical information of the patient from her previous hospital, namely the Penang General Hospital, during the pre-operation stage. However, we do not think that Dr Wong ought to be made liable, together with Dr Cheok, during the pre-operation stage.
- E [68] As for Dr Patrick, there is evidence that he had obtained an informed consent before administering anaesthesia to the patient for surgery. As such, he cannot be held liable for negligence at the pre-operation stage.
- F During The Operation Stage
- F [69] In our view, the learned JC had rightly relied on the medical expert opinion of Dr Kuldip (PW2), Dr Sylvian Dass, and Professor Chan Yoo Kuen ("Professor Chan") (DW3) to arrive at his findings that Dr Cheok and Dr Wong had breached their duty of care during the operation stage.
- G [70] During the surgery, the patient was put in a prone position. Dr Kuldip, Dr Sylvian Dass and Professor Chan were of the view that the prone position and the administering of anaesthesia are a common practice in spinal surgery so long as the doctors have taken all the necessary precautions to ensure the patient's safety.
- H [71] However, Dr Kuldip gave evidence in detail about the risk of positioning the patient in a prone position and the administration of anaesthesia where the patient suffers hypotension and there are no SCM facilities to assist the doctors during the surgery.
- I [72] Based on the evidence of Dr Kuldip, Dr Sylvian Dass, and Professor Chan, we are of the considered opinion that the learned JC is correct in holding that both Dr Cheok and Dr Wong were negligent in undertaking the

surgery on the patient without requesting the hospital to supply the SCM facilities for their use during the surgery. However, in our view, the hospital cannot be made liable for failure to provide such facilities when, in the first place, Dr Cheok and Dr Wong did not request the hospital to make the facilities available for their use during surgery. The X-rays and MRI done on the patient show clearly that the patient's condition was due to the negligence of these two doctors in the exercise of their professional skills during the course of the surgery performed by them, and this has nothing to do with the hospital. Therefore, the learned JC had erred to hold that the hospital is liable for not providing those SCM facilities, and for organisational and system failure.

[73] As for Dr Patrick, there is no evidence to prove that he was negligent during the surgery performed on the patient by Dr Cheok and Dr. Wong. We have scrutinised the written judgment and we do not find any basis to support the learned JC's finding that Dr Patrick was negligent in the administration of the anaesthesia during the course of the operation, notwithstanding the high risk involved when the patient was put in a prone position during the surgery and subjected to "hypertensive anaesthesia". [note: The learned JC had used the term "hypertensive anaesthesia" in his judgment which we respectfully think is incorrect. The correct term should be "hypotensive anaesthesia" (see the opinion of Dr Kuldip in AR Vol 2(9) Pt C pp. 2885 and 2886 in Appeal No. 1401)].

[74] In our view, it would be wrong to conclude that because of the patient being put in the prone position for administration of anaesthesia, the patient is now a quadriplegic. We think it appropriate to apply the "but for" test here. But for the spinal cord surgery being performed on the patient by Dr Cheok and Dr Wong without the use of the SCM facilities, we do not think that the mere act of putting the patient in the prone position and administering the hypotensive anaesthesia would by itself cause the quadriplegia. Therefore, we are satisfied that Dr Patrick cannot be held liable for negligence during the operation stage.

[75] Finally, it all boils down to the actual surgery being conducted, whether there is negligence on the part of Dr Cheok and Dr Wong.

[76] Dr Kuldip explained that the cause of quadriplegia was not due to cord distraction at the time of the correction of the deformity, but due to ischaemia of the cord due to a vascular event. Therefore, the spinal cord monitoring during the operation is very important. Dr Kuldip stated that the doctors should not be doing scoliosis surgery without the SCM facilities. Dr Kuldip's evidence was supported by another expert witness, Dr Sylvian Dass.

[77] Professor Chan (DW3) was the doctors' expert witness. She also acknowledged the importance of having SCM facilities during spinal surgery. We now reproduce her answer in court which was considered by the learned JC:

- A In this particular surgery, what they are actually trying to do is to straighten out the spine that has gone, in layman's term crooked. So they would like to straighten it. But in straightening it, they can actually stretch the bones and ultimately the cord. So the function of the cord is to allow the nerves transmission from the lower limbs back to the brain and also for transmission of further impulse from the brain downwards. So, when
- B the surgeons operate and they distract the cord that means they have actually stretched too far, the function of the cord will be compromised. So this monitoring is to actually help us determine whether there has been a compromise at all in this cord. And if there is a compromise then the surgeon should use this monitor to tell him to reduce the distraction, that means, instead of pulling that long, to reduce the distraction so that the
- C injury would not be there or would be minimal.

[78] According to Professor Chan, SCM facilities are not new to the medical world as they were introduced as early as in the 1970s. Her working place at University Malaya Medical Centre also has the SCM facilities.

- D [79] Both Dr Cheok and Dr Wong relied on the basic wake-up test which was carried out once in the said surgery. However, as stated by the learned JC, this is not an efficient method to monitor the spinal cord continuously during the surgery. Thus, even though the wake-up test was used, and after surgery while at the ICU, the patient could move her leg, the fact remains
- E that the end result is that the patient is quadriplegic. If the spinal surgery had not been undertaken by Dr Cheok and Dr Wong on that day, the patient would not be a quadriplegic and dependent on the ventilator today.

- [80] We therefore agree with the learned JC that Dr Cheok and Dr Wong had breached their duty of care to the patient in performing the spinal surgery
- F without the SCM facilities.

- [81] The hospital cannot be made liable for failure to provide such SCM facilities when, in the first place, Dr Cheok and Dr Wong did not request the hospital to make these facilities available for their use during surgery. In our opinion, the learned JC had erred to hold that the hospital was liable for
- G not providing those facilities, and for organisational and system failure.

Post-Operation Stage

- [82] We agree with the submissions of learned counsel for the three doctors that there was no specific pleading by the patient and her parents on the three
- H doctors' negligence after the surgery in regard to the premature transfer of the patient from the ICU to the general ward. What was pleaded in the defence and amended counterclaim of the patient and her parents, in particular paras. 11-28 to 11-30, was only in respect of system failure ie, the doctors' failure to have a proper, effective, safe and reliable system for the treatment
- I of the patient and to prevent causing injury to the patient (see also para. 132

of the judgment in AR Vol 1/2 pt A p. 52). In our opinion, this pleading is insufficient to cover the doctors' negligence at the post-operation stage. The patient and her parents are bound by their pleadings and thus they can only claim for the purported negligence of the three doctors before and during the surgery, but not after that. As such, Dr Cheok, Dr Patrick and Dr Wong cannot be held liable for negligence after the surgery ie, for the alleged premature discharge and transfer of the patient from the ICU to the general ward.

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[83] In view of this, it logically follows that there was no causal link or causation proved by the patient and her parents against the hospital. The hospital cannot be made liable for the decision of Dr Cheok to direct the nurses to discharge and transfer the patient from the ICU to the Paediatric general ward. In any case, as submitted by learned counsel for the hospital, the pleadings of the patient and her parents only pleaded causation against the three doctors, but not against the hospital. It was not pleaded that the hospital caused the quadriplegia of the patient. The hospital did not perform the surgery on the patient and therefore cannot be held liable for the quadriplegia that resulted from the surgery. None of the alleged acts or omissions of the hospital nurses, whether in the ICU or at the general ward, would *per se* or intrinsically by itself cause the quadriplegia of the patient.

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Regarding The Issue Of Quantum Of Damages

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[84] We do not find any appealable errors regarding the award made by the learned JC on general damages, general damages for future care, and special damages and pre-trial losses for the items of travel expenses, and future care and expenses.

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[85] In our opinion, the learned JC rightly held that in the absence of any evidence adduced in court from any expert witness of the hospital and the three doctors, the unrebutted evidence of the patient's consultant physiotherapist, Dato' Dr Balwant Singh Bains (PW5), and rehabilitation physician, Dr Mohd Izmi (PW6), ought to be accepted.

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[86] However, for the item on "life expectancy", we deem it fit to vary the multiplier of 21.4 years used by the learned JC based on the NSCISC database and based on a life expectancy of 48.6 years [12 (age of patient at injury) + 36.6 (High Tetra (C1-C4)) = 48.6 years] (on the basis that the patient is not ventilator dependent) to a multiplier of 13 years based on a life expectancy of 37.3 years [ie, life expectancy of 37.3 – Age at trial of 18 years – 1/3 contingencies = 12.86 (rounded up to 13 years)] for the patient who is still ventilator dependent. We note that in fact the learned JC had also considered a life expectancy of 36.9 years if the patient is ventilator dependent ie, 12 (age of patient at injury) + 24.9 (ventilator dependent) =

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- A 36.9 years (see para. 175 of his judgment at AR vol 1/2 Pt A p. 67). According to our calculation, that would give a multiplier of 12.6 years [ie, life expectancy of 36.9 - age at trial of 18 years – 1/3 contingencies = 12.6 years (rounded up to 13 years)]. We further considered the latest report of
- B Dr Theva Raj a/l Ponnudurai (“Dr Theva”), Head of the Rehabilitation Medicine Department of the Tuanku Ja’afar Hospital, Seremban, who was appointed by this court by an order dated 17 October 2017 pursuant to the notice of motion in encl. 25(a) filed by the appellant’s counsel in Appeal No. 1401 (see Dr Theva’s expert report dated 21 November 2017, supplementary record of Appeal No. 2 at pp. 38 and 39), and the submissions of respective
- C learned counsel for the hospital, the three doctors, and the patient and her parents on the appropriate multiplier to be used.

- [87] Dr Theva had stated that at the time of his report (at that time the patient was still not weaned off the ventilator), the patient was 21 years of age, and her further life expectancy referencing this would be another 21.74
- D years. However, due to potential additional complications, the care level at home in future, and her high risk of repeated infections that could make her life expectancy to be as short as six months to two years. It could possibly be as long as 22 years if her pressure sores were healed before her discharge.

- [88] The hospital submits that the multiplier ought to be from as low as 3.5
- E years based on a life expectancy of 23 years (ie, $23 - 18 - 1/3 = 3.33$ (rounded up to 3.5 years)) to a multiplier of 13 years based on a life expectancy of 37.3 years (ie, $37.3 - 18 - 1/3 = 12.86$ (rounded up to 13 years)).

- [89] The three doctors submit that at the very least, the multiplier should be reduced from 21.4 to 13 years.

- F [90] The patient and her parents submit a life expectancy of 56.6 years and a multiplier of 27.02 years (ie, $56.6 - 18 - 30\% = 27.02$ years). However, in their table on quantum ie, tables 1 and 2, they have stated a multiplier of 18 years. We note, however, that there is no submission on how they derived
- G at the multiplier of 18 years. In our opinion, the appropriate multiplier ought to be 13 years as stated by the learned JC in his judgment if the patient is ventilator dependent, which the patient currently is, and as submitted by the hospital and the three doctors.

- H [91] Further, the awards by the learned JC on the items under disabled friendly home, cost of disabled friendly motor vehicle, costs of machines and appliances and equipment are not plainly wrong and are therefore upheld by us except that, wherever applicable, the multiplier of 21.4 years is to be now substituted with the multiplier of 13 years.

- I [92] Regarding the item on cost for home nursing care, we agree with the submissions of learned counsel for the three doctors that the learned JC did not give any reason or basis on why he awarded the sum of RM10,000 per

month for nursing care. There was no mention of specific evidence to support the amount awarded. We further note that there is no evidence to support the appeal of the patient and her parents to increase the cost of nursing care from RM10,000 to RM50,000 per month as stated in their cross-appeal. We are of the opinion that there is no justification for the patient and her parents to claim RM50,000 a month based on their submissions that the hospital was charging about RM50,000 per month. We consider the fact that the award here is one for home nursing care, and not for institutional/hospital nursing care. We also note the initial submissions of the three doctors that a possible award would, at the most, be between RM20,000 to RM25,000 per month.

[93] We also considered the decision in *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885; [2016] 2 MLJ 1 where the sum of RM800 per month for one maid was awarded by the trial judge and affirmed by the Federal Court. Nevertheless, in the present case, we do not think that we should disturb the award of RM10,000 given by the learned High Court Judge for home nursing care. To our minds, this sum is reasonable since the patient, being ventilator dependent, would require not just one maid to take care of her basic needs, but requires proper nursing care and management.

[94] Regarding cost of care, for physiotherapy and massage therapy, and regarding cost of future medical treatment/consultations, and cost of personal and hygiene needs, the awards given by the learned JC are upheld except that the multiplier of 21.4 years, wherever applicable, is now substituted with the multiplier of 13 years.

[95] Regarding the award for the total sum of RM6,023,802 for general damages for pain and suffering and loss of amenities of life, we are of the opinion that the sum of RM6,023,802 ought to be varied according to the new multiplier of 13 years being factored into any of the foregoing applicable items stated in para. 201 of the judgment of the High Court (AR vol 1/2 pt A p. 79).

[96] We do not think that the learned JC was plainly wrong in his exercise of discretion not to allow the patient an award on damages for goods and services tax (GST), which would be incurred in the future, on various items of future loss and damage. As such, we do not think that there should be appellate intervention regarding this item.

Appeal No. 290

[97] Learned counsel for the hospital submitted that para. 4 of the sealed order of the High Court dated 14 July 2015 (appellant's CB - judgments – for Appeal No. 1401, pp. 40-43 at p. 42) contains the error of referring only to the third plaintiff, ie, the patient, in her counterclaim against the hospital and the three doctors. This is inconsistent with, and does not reflect, the

A decision of the learned JC in his judgment dated 14 July 2015 which in para. 207 clearly refers to “the plaintiffs” (appellant’s CB vol. 1 (revised) tab 1 at p. 61).

B [98] Learned counsel for the hospital submitted further that this was also borne out by the fact that the patient and her parents had pleaded in their amended counterclaim re-dated 27 March 2015, the following at para. 16:

Oleh yang demikian Plaintiff Pertama, Kedua dan Ketiga menuntut dari Defendan-defendan:

- C
1. Gantirugi am;
 2. Gantirugi khas;
 3. Kos;
 4. Faedah;
 5. Lain-lain relief.

D (Note: “Plaintif Pertama, Kedua dan Ketiga” above refer to the Patient and her parents).

[99] Learned counsel for the hospital also pointed out that the learned JC had expressly stated in his judgment at para. 206 that:

E In the Counterclaim, the Defendants who become the Plaintiffs, claim for damages for medical negligence. The Plaintiffs claim is allowed.

F [100] The learned JC, Abdul Wahab bin Mohamad, held that “there is no discrepancy as claimed by the hospital”. As such, he dismissed the hospital’s application and did not correct the alleged errors and discrepancies between the judgment of the learned JC, Nordin bin Hassan, and the sealed order of the High Court dated 14 July 2015, as contended by the hospital.

G [101] Upon a thorough perusal of the sealed order of the court and the judgment of the learned JC, we find no merits in this appeal by the hospital. We are of the opinion that para. 4 of the sealed order of the High Court dated 14 July 2015 (appellant’s CB – judgments - for Appeal No. 1401, pp. 40-43 at p. 42) is correct when it refers only to the third plaintiff, ie, the patient, for the purpose of the counterclaim in regard to general damages, and general damages for future care. This is consistent with and is supported by the second para. 4 at p. 5 of the same order which states, “tuntutan plaintiff ke-3 dalam tuntutan balas dalam kedua-dua guaman no. 85 dan 307 dalam jumlah RM6,037,600 dibenarkan”. It must be noted that the hospital filed the original action for outstanding medical bills against only the patient’s parents (see statement of claim (“SOC”), and amended SOC). The patient was only brought in as a party and was involved when the defendants filed their defence and made a counterclaim against the hospital and the three doctors for negligence. Thus, it should be understood that the learned JC had

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intended that the patient be the only person entitled to be awarded the general damages, and not the patient's parents. To hold otherwise would lead to absurdity. Notwithstanding the fact that in para. 207 of the judgment of the High Court dated 14 July 2015 (AR vol 1/2 pt A p. 80) it is stated that "the defendants in the counterclaim is (*sic*) to pay the plaintiffs general damages of RM6,023,802", it is our view that general damages are to be paid only to the patient, as the third plaintiff in the counterclaim, and not to the patient's parents who did not undergo spinal surgery and suffer such damages.

[102] We further note that the sealed order of the High Court refers to general damages in the sum of RM6,037,600 which is erroneous since the judgment of the High Court in para. 208 (AR vol 1/2 pt A p. 80) expressly states that the total judgment sum is RM6,023.802. In our opinion, the error has to be corrected. However, in the light of our decision, and taking into account the new multiplier of 13 years, this sum has to be further amended accordingly.

Orders Of This Court

[103] Based on our unanimous decision, we made the orders of this court on the four appeals as stated earlier in paras. 36 to 45 of this judgment.

Costs

[104] We considered the submissions of learned counsel of all parties on 27 April 2018 regarding costs for the four appeals, and we made the following unanimous decision and orders:

Appeal No. 1384

[105] The patient and her parents are to pay the hospital costs of RM30,000, subject to payment of the allocator fee.

Appeal No. 1385

[106] Dr Cheok and Dr Wong together are to pay the patient and her parents costs of RM30,000, subject to payment of the allocator fee.

[107] The patient and her parents are to pay Dr Patrick costs of RM30,000, subject to payment of the allocator fee.

Appeal No. 1401, and the Cross-Appeal

[108] The patient and her parents are to pay the hospital costs of RM60,000 here and below, subject to payment of the allocator fee.

[109] We recorded by consent of the parties that the patient's parents undertake to procure the discharge of the patient from the hospital within three months from the date of payment of the judgment sum by Dr Cheok and Dr Wong.

A [110] Upon the oral application of learned counsel for the hospital, we ordered that the sum of RM6,037,600 together with interest which have been deposited under a previous order of the court, with the solicitors for the hospital, Messrs Chan Bee Eng & Co, to be released to the hospital.

Deposits

B [111] The deposits for the four appeals are to be refunded to the respective appellants.

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